IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LEVI ABERCROMBIE, SR., Appellant, and LEVI ABERCROMBIE, JR., and each of them, Defendant.	)	No. 60603-4-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2009

AGID, J.—A cooperating witness identified Levi Abercrombie, Sr., as the man who sold her crack cocaine on April 14, 2006. The witness also bought more crack cocaine from Abercrombie, Sr.'s son, Abercrombie, Jr., who attempted to take credit for both crimes. The prosecutor did not commit misconduct during closing argument by making a reasonable inference from the evidence about why the cooperating witness would not have a motive to lie. And the prosecutor's isolated understatement of the negative consequences that Abercrombie, Jr., who was already facing a long prison

sentence for selling cocaine, would face if he lied in order to take the fall for his father was neutralized by an instruction that arguments are not evidence. Accordingly, we affirm the conviction. We remand to correct a conceded sentencing calculation error and for a comparability analysis. Finally, Abercrombie, Sr., knowingly chose not to fire a lawyer who reflects poorly on the profession, and the record does not show that his lawyer's inability to appear awake persisted during the trial.

FACTS

In April 2006, police received information about ongoing drug activity at an apartment. Detective Robert Tschida believed that Levi Abercrombie, Sr., lived in the apartment with his son, Levi Abercrombie, Jr., who had previously been arrested for selling drugs. Tschida sent a cooperating witness, Michelle Eaton, to the apartment to buy drugs on April 14 and 30, 2006.

On April 14, 2006, Eaton purchased $40 worth of crack cocaine. After the buy, she looked at a photo montage containing a photograph of Abercrombie, Sr. She identified him as the seller. On April 30, 2006, Eaton performed another controlled buy, this time purchasing $40 worth of crack cocaine from Abercrombie, Jr.

Eaton has worked as a cooperating witness for 13 years. A cooperating witness is a civilian who works with police, is willing to have her name disclosed, and will testify in court. Tschida testified that the police pay cooperating witnesses "for their time" and answered "no" when asked if he requires "a cooperating witness to always come back with drugs if [he] send them into a controlled buy situation." Eaton works as a cooperating witness because she had lost her family to her past drug problems and

testified that "it's worth it" if she "could save one mother or one child." Tschida had worked with Eaton for three years before he sent her to do these controlled buys. Before the April 14, 2006 buy, Tschida searched Eaton and gave her buy money. Tschida searched her pockets after the buy.

Abercrombie, Sr., denied having sold drugs to Eaton but remembered her coming into the apartment once and using the bathroom. Eaton acknowledged using the bathroom on April 30, 2006, before she bought crack cocaine from Abercrombie, Jr. Abercrombie, Jr., testified that he sold crack cocaine to Eaton on both April 14 and April 30, 2006. He admitted that he was in prison because he had sold crack cocaine to Eaton on April 30, 2006. He also admitted that he was going to be in prison for a long time. The jury found Abercrombie, Sr., guilty as charged.

DISCUSSION

Abercrombie argues that the prosecutor misrepresented the facts during closing argument by stating, "Also, what about the motive, what kind of motive does somebody have? Well, Michelle[] Eaton's motive, what is it? Yep, she's gettin[g] paid, but she's going to get paid whether she gets drugs in that house or not." After the trial court overruled Abercrombie, Sr.'s objection that the statement was not in evidence, the prosecutor continued, "She's paid whether she gets the drugs or not. My memory is correct, Detective Tschida testified to that. You [referring to the jury], of course, need to rely on your memory." The trial court reminded the jurors to rely on their memory to determine the facts of the case:

> [t]o the extent the defense attorney makes an objection as to what the evidence does or does not support concerning the argument that the

> prosecutor just made, this is one of those examples where someone's saying, my memory is this, my memory is that, and in the end it's your memory that has to determine that issue, okay?

In order to sustain a claim of prosecutorial misconduct, a defendant must show that the conduct was improper and had a prejudicial effect.[1] A prosecutor commits misconduct by misrepresenting the facts in the record.[2] No misconduct occurs when a prosecutor does no more than make arguments from evidence.[3] Prosecutors may draw and express reasonable inferences from the evidence during closing argument.[4] Here, Abercrombie argues that no evidence supported the prosecutor's claim that Eaton would get paid whether or not she purchased drugs from the apartment. But Tschida testified that he does not require cooperating witnesses to always come back with drugs and that the police pay cooperating witnesses for their time. This testimony supports the inference that he did not require Eaton to come back with drugs from this controlled buy in order to get paid. Accordingly, the prosecutor did not commit misconduct when explaining why Eaton would not have a motive to lie.

Abercrombie, Sr., also claims that no evidence supports the prosecutor's argument that Abercrombie, Jr., had a motive to lie because he was "going to be in jail for so long" that "it's not going to make any difference" if he faced an additional time by taking the blame for selling crack cocaine to Eaton on April 14, 2006. Here, the evidence showed that Abercrombie, Jr., was going to be in prison for a long time and

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[1] State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

[2] Miller v. Pate, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967).

[3] State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), review denied, 121 Wn.2d 1020 (1993).

[4] State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983).

that he had been convicted of delivering drugs to Eaton on April 30, 2006. In addition, Abercrombie, Jr., testified that he was not given any sort of immunity or protection from prosecution before his testimony. While this evidence supports an inference that admitting an additional crime would make "little difference" for Abercrombie, Jr., in light of his already long sentence, it does not support the claim that the State actually made during closing argument, which was that admitting an additional crime would not make "any difference" for Abercrombie, Jr. Thus, the State improperly stated that lying would not negatively affect Abercrombie Jr., when the evidence instead shows that he could have been exposing himself to additional penalties by lying about committing the crime for which his father was standing trial.

Abercrombie, Sr., argues that he was prejudiced by the prosecutor's misconduct because it went to the heart of his defense, which was general denial supported by his and his son's testimony. Misconduct is prejudicial when there is a substantial likelihood that the misconduct affected the jury's verdict.[5] The defendant claiming prosecutorial misconduct bears the burden of establishing the prejudicial effect.[6] The prejudicial effect must be viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.[7] Reversal is not required when the error is obviated by a curative instruction.[8] Here, the instructions provided by the trial court obviated any potential prejudice from the

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[5] State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

[6] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

[7] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

[8] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

prosecutor's isolated overstatement of what the evidence showed when it instructed the jury to "disregard any remark, statement, or argument that is not supported by the evidence" and that "the lawyers' statements are not evidence."

Abercrombie, Sr., cites to State v. Jones[9] and State v. Rivers[10] for the proposition that misconduct is prejudicial when the verdict substantially depends on witness credibility and the misconduct impacts credibility. In Jones, the prosecutor persistently attempted to bolster the credibility of a police officer and confidential informant with "highly inflammatory" facts not in evidence, and Division Two of this court reversed the conviction, holding that repeated misconduct cumulatively deprived the defendant of a fair trial.[11] In Rivers, the prosecutor attacked defense witnesses, some of whom were incarcerated for participating in the assault at issue in Rivers' trial, by asking the jury to imagine how those witnesses would be welcomed in the shower by their compatriots, "'who are wearing pajamas up in the King County hotel,'" if they had testified in court that the defendant was also involved in the assault.[12] This court reversed Rivers' conviction, holding that the prosecutor's highly inflammatory comments were clearly intended to inflame the jury's passion and prejudice.[13] Unlike Jones, the prosecutor here did not repeatedly argue highly inflammatory facts that were not in evidence, making Jones's cumulative misconduct holding inapplicable. And unlike Rivers, while the prosecutor here improperly minimized the potential for

[9] 144 Wn. App. 284, 183 P.3d 307 (2008).
[10] 96 Wn. App. 672, 981 P.2d 16 (1999).
[11] 144 Wn. App. at 297, 300-01.
[12] 96 Wn. App. at 674.
[13] Id. at 676.

Abercrombie, Jr.'s testimony to negatively affect him, she did not inflame the jury's passion or prejudice through her misstatement.

Instead, this case is more like State v. Coleman, where the prosecutor made a statement that could have been "construed as telling the jury that it would violate its oath if it disagreed with the State's theory of the evidence."[14] This court held that the defendant did not establish prejudice because the case involved only a single instance of misconduct, which was tempered by the prosecutor's later comments.[15] Here, as in Coleman, the prosecutor only committed a single instance of misconduct and tempered the effect of that overstatement by reminding the jury that it was their job to find the facts.

Finally, reviewing the misstatement in the context of the entire case, the jury still could have concluded that Abercrombie, Jr., had a motive to lie despite potentially negative consequences. For example, a jury could have found that the marginal effect of additional punishment on top of his already long jail sentence is slight compared to the potential benefit of exonerating his father. Or the jury might have found that Abercrombie, Jr., was less credible than Eaton and Tschida even if they did not find that he had a motive to lie. Accordingly, Abercrombie, Sr., does not meet his burden of establishing that the prosecutor's isolated use of the adjective "any" instead of "little" had a substantial likelihood of affecting the jury's verdict.

The State agrees with Abercrombie, Sr., that his 1998 cocaine possession conviction is not a "drug offense" for the purpose of scoring and that it accordingly

[14] 74 Wn. App. 835, 839, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995).
[15] Id.

should have counted as one point, not three.[16] The State also concedes that the sentencing court did not perform a comparability analysis before adding one point to Abercrombie, Sr.'s offender score for a 1953 New Mexico robbery with a dangerous weapon conviction and one point for Abercrombie, Sr.'s 1957 Texas robbery by assault convictions. Where, as here, the defendant failed to object to the State's classification of out-of-state convictions, we must remand for resentencing with an evidentiary hearing to allow the State to prove comparability.[17]

Abercrombie, Sr., argues in his pro se statement of additional grounds that he was denied effective assistance of counsel because his retained lawyer, Alan Mark Singer, was or appeared to be sleeping through part of jury selection. To demonstrate ineffective assistance, Abercrombie, Sr., must show that defense counsel's representation fell below an objective standard of reasonableness and that the deficient representation prejudiced him.[18] Sleeping or appearing to sleep during trial is objectively unreasonable.[19] "[S]leeping counsel is tantamount to no counsel at all."[20] Sleeping through a substantial portion of the trial is "inherently prejudicial and thus no separate showing of prejudice is necessary."[21]

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[16]Under former RCW 9.94A.525(12) (2006), recodified at RCW 9.94A.525(13), three points are added to the offender score for a present drug offense conviction for each adult prior felony drug offense conviction, but possession of a controlled substance does not count as a "drug offense." RCW 9.94A.030(24)(a).

[17] State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007).

[18] See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[19] Javor v. U.S., 724 F.2d 831, 834 (9th Cir. 1984) (holding that "unconscious or sleeping counsel is equivalent to no counsel at all" and that "[t]he mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel.").

[20] U.S. v. DiTommaso, 817 F.2d 201, 216 (2d. Cir. 1987) (holding that defendant failed to provide factual support for his allegation that his attorney slept through portions of his trial).

[21] Javor, 724 F.2d at 833.

Here, the record shows that both the judge and the prosecutor expressed concern that defense counsel was, or appeared to be, sleeping through part of jury selection.[22] The trial court played the record of the hearing regarding Singer's inability to appear awake for Abercrombie, Sr., to hear. Abercrombie, Sr., agreed that he heard everything, at which point the trial court engaged in a lengthy colloquy about how Singer's propensity to sleep, or at least think with his eyes closed, would affect him at trial.[23] The trial court told Abercrombie, Sr., that he could continue without Singer and have other counsel appointed for him.[24] Abercrombie, Sr., elected to continue with Singer and understood that he was waiving an ineffective assistance claim on appeal.

Because Abercrombie, Sr., knowingly elected to continue with Singer, he waived his claim that Singer provided ineffective assistance by appearing to sleep through part of jury selection. And the record does not show that Singer slept or appeared to sleep after Abercrombie, Sr., decided not to fire Singer, who promised that he would appear to be awake for the rest of trial.

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[22] The prosecutor first raised the issue: "I do not mean to be rude at all, but I think Mr. Singer slept through the first half of jury selection (inaudible). I (inaudible) and your client was watching you." And the judge agreed: "I have to confirm, Mr. Singer, that I have seen you sleep through many of my hearings. Right in front of me I've seen you fall asleep while I was talking to you and you had to be brought out of it. This goes back a few years now, into family court when I was in unified family court. I don't know what your health problem is, but it's true, you do and it happened this morning when you had to sort of be brought out of it in order to respond." Singer continually denied that he was sleeping, claiming that appearing to be asleep is "just the way I think. I put my head down and I relax, but I don't sleep."

[23] As a result of the colloquy, the trial court found that Abercrombie, Sr., was "on notice that he has a lawyer who in all likelihood will look like he's falling asleep through the rest of the trial."

[24] "You can continue to go forward with Mr. Singer, but if you do, you will be giving your right up to claim that he was not effective because of this apparent sleep problem. And I'm not forcing you to do that. I am willing to stop this trial now and continue it and give you the right to either retain other counsel or to have counsel appointed for you." "[A]nd that's why you need to think this through and make a decision about whether you'd rather have a different lawyer who doesn't have this problem."

Abercrombie, Sr., also alleges that Singer provided ineffective assistance because he had charges pending against him and because he was caught taking pills. The record supports Abercrombie, Sr.'s allegation that Singer had been charged with a crime, but it also shows Singer disclosed that information to his client and that Abercrombie, Sr., nonetheless continued with Singer. Although the prosecutor saw Singer taking pills in court and brought his observations to the court's and Abercrombie, Sr.'s attention, Singer claims that he was either eating candy or taking prescribed medication. The record does not show that Singer was ingesting illicit substances or that whatever he was eating had any prejudicial effect on Abercrombie, Sr.

Abercrombie, Sr., also argues that the State failed to prove beyond a reasonable doubt that he committed the crime charged because his son took the blame for selling cocaine to Eaton on April 14, 2006. While that is true, the jury, as the finder of fact, makes credibility determinations. Here, the State presented sufficient evidence in the form of testimony from Eaton and Tschida that Abercrombie, Sr., sold $40 worth of crack cocaine to Eaton. The jury could have believed Abercrombie, Jr.'s alleged confession, but did not, and we do not disturb that finding on appeal.

We affirm Abercrombie, Sr.'s conviction and remand for resentencing. The trial court will subtract two points from Abercrombie, Sr.'s offender score and allow the State to prove the comparability of the Texas and New Mexico crimes.

Ajid, J.

WE CONCUR:

Applewick, J

Grosse, J